

GOVERNMENT
DEPOSITION
EXHIBIT
161

Competitive Programs
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Proposal

To determine the position of the U.S. Board with respect to U.S. members participating in competing card programs and whether the U.S. Board believes the matter should be addressed at the global or regional level.

Background

The pre-read document which was submitted to the Global Board is attached as Attachment 1. The document provides pertinent background and analysis of the issue along with the recitation of the various options available to MasterCard.

MasterCard's U.S. Region management has sought to ascertain the viewpoint of the membership on this issue through reviewing with a number of members their reaction to MasterCard's undertaking the options available to it. The results of that review will be shared with the U.S. Board at our meeting.

Analysis

MasterCard's U.S. Region management believes that the U.S. Region Board should be empowered by the Global Board to determine what is in the best interest of the MasterCard brand in the United States with respect to this issue. Management also believes that it is in MasterCard's best interest for members to be dedicated to the promotion and support of the brand and that the level of support would be diminished or compromised if members participated as issuers and/or acquirers in competing general purpose card programs (as defined in the Global Board document). Any such reduction in the level of support could result in share loss and be detrimental to the brand.

Accordingly, management's recommendation to the U.S. Board is that a policy be established in the United States that MasterCard members may not participate in competing general purpose card programs as issuers and/or acquirers and that management be authorized to take appropriate steps to effectuate the policy. At the same time, management also believes that MasterCard should, wherever appropriate, avoid imposing any restrictions on its members. As such, management also recommends that the Board

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adopt language stating this philosophy and affirming MasterCard's practice of treating such situations on a case by case basis after weighing the particular facts and circumstances.

Resolutions

RESOLVED, that, it is the position of the U.S. Board that it should be authorized by the Global Board to take whatever action it deems appropriate with respect to the issue of members participating in competing general purpose card programs in the United States; and,

RESOLVED FURTHER, that the U.S. Board adopts the following statement of principle as its general philosophy regarding MasterCard's role with respect to how its members conduct business and its policy regarding members' participating in competitive programs. Such policy shall be effective if, and at such time, as the Global Board authorizes the U.S. Board to address this issue.

Statement of Principle

MasterCard has a long-standing practice of attempting to provide its members with maximum flexibility in conducting their card business so long as such flexibility does not give rise to circumstances detrimental to the MasterCard brand. As such, MasterCard has no blanket rule which seeks to preclude its members from choosing with whom they wish to do business. Instead MasterCard has elected to deal with specific situations or circumstances as they arise looking at, in each instance, what is in the best interest of the MasterCard brand and the MasterCard membership as a whole.

MasterCard believes that the effectiveness and success of the MasterCard association and the strength and vitality of the MasterCard brand is based in large part on the support and promotion of the brand by MasterCard members. MasterCard further believes that the level of dedication to the brand would be diminished if MasterCard members participated as issuers or acquirers in competing general purpose credit card programs as defined below.

To address this concern, MasterCard adopts the following policy on Competitive Programs. This policy is consistent with the philosophy expressed herein and, as such, MasterCard does not rule out the possibility that member participation in a general purpose program might be permitted where such would not be viewed as detrimental to the brand, and where all MasterCard members were provided with access and opportunity to participate on the same terms and conditions. In reviewing the American Express proposal against this standard, the U.S. Board has concluded that the policy should apply.

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MasterCard's Policy on Competitive Programs

With the exception of participation by members in Visa, which is essentially owned by the same member entities, and several pre-existing programs to the extent individual members participate, most notably Diners Club and JCB, members of MasterCard may not participate either as issuers or acquirers in competitive general purpose card programs. For purposes of this policy, a member that does nothing more than engage in merchant terminal processing is not participating as an acquirer. Also, for purposes of this policy, a "competing general purpose card program" is a credit or T&E program identified by a multi-regional acceptance mark, the cards of which are general purpose cards accepted by merchants in at least two regions (i.e. MasterCard regions).

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Competitive Programs
H. Eugene Lockhart, President and CEO
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PROPOSAL

To review with the Board the issue of MasterCard members participating in "competing general purpose card programs" (as defined below) and to determine the Board's position whether a policy or rule should be adopted with respect to such programs and, if so, whether the authority to implement or not implement such a policy or rule should be conferred upon regional boards as they deem appropriate.

BACKGROUND

Historically, MasterCard members have participated in programs competitive to one or more of MasterCard's programs. For example, many years ago, some members participated in the American Express Gold Card program by making accompanying credit lines available to holders of such cards. MasterCard members have participated, and continue to participate, as issuing agents in the American Express Travelers Cheques program. Some members actively participate in acquiring American Express transactions and some members have the right to issue and/or acquire JCB transactions. And, of course, most MasterCard members also participate in VISA programs.

In 1991, VISA U.S.A. adopted a rule which precludes its members from participating as issuers or acquirers in American Express, Discover or any other programs deemed competitive by the VISA U.S.A. Board. Before this year, this rule was not adopted by any other VISA region which is consistent with VISA's approach to allow its regional boards to adopt different approaches in their rules for their region. In the first quarter of this year, VISA Europe began deliberating the possibility of adopting a similar rule for Europe.

In April of this year, in response to news of the VISA Europe initiative, American Express, and subsequently Discover, filed complaints with the European Commission alleging that the proposed adoption by VISA Europe of the aforementioned VISA U.S.A. rule would violate Article 85 of the Treaty of Rome. On May 2, 1996, Harvey Golub, Chairman of American Express, in a speech at the Credit Card Forum in Atlanta, Georgia, encouraged MasterCard and VISA members in attendance to open discussions with American Express about a possible joint venture-type of arrangement. Additionally, senior American Express staff have been active in multiple regions across the world in selling this approach to member banks.

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On June 6, 1996, it was reported that the VISA International Board had decided to refer to each VISA region the decision whether to adopt a VISA U.S.A.-type rule and the Europe Region Board had decided not to do so.

As described below, MasterCard management believes that the regional boards should each evaluate whether or not they should adopt a policy or rule in their regions with respect to competing general purpose card programs generally, or a specific policy regarding American Express.

ANALYSIS

Any analysis of this issue must start with the fact that MasterCard already allows members to participate in VISA, a competitive program, which is essentially owned by the same member entities. Also, Diners Club is owned and operated by a MasterCard member and other MasterCard members operate Diners Club franchises in their countries. As indicated above, there are also instances of members participating in, as issuers and/or acquirers, other multiregional, general purpose card programs, albeit on a limited scale at this time. Finally, our members are also involved in regional and local payment card programs and provide support for proprietary programs.

These facts raise the question as to exactly what type of competitive activity is the subject of the analysis and potential action. Management is not proposing that the Board reconsider the issue of whether there should be MasterCard and VISA duality. Also, given the long-standing ownership of the Diners Club Program in the U.S. and selected countries, management does not propose that participation in this program should be an issue included for the Board's consideration. For that reason, all future references in this document to "competing general purpose card programs" will exclude these two programs.

MasterCard management believes that the focus of our inquiry should be whether MasterCard should preclude or regulate members' participation in "competing general purpose card programs", that is, programs whose mark is a multi-region acceptance mark and the general purpose cards of which are accepted by multiple merchants in at least two regions (i.e., MasterCard regions) of the world. Also, for purposes of this agenda item, a "general purpose card" is a credit or T&E card which can be used to make a wide variety of purchases at many different merchants who are not affiliates of the issuer of the card. If the Global Board or a regional board decides that members should not be allowed to participate in any such program and remain members of MasterCard, the fact that members already participate in such programs means that any rule or policy eventually must address these situations, but this need not be done at the time of adoption of the rule or policy.

Impact on the Brand

The basic issue is whether the Board, weighing all the factors, believes that it is in the best interest of the brand to allow members to continue in MasterCard and also participate in American Express, Discover, JCB or other competing general purpose card programs. From the members' standpoint, it has been said that MasterCard, being an association established for the benefit of its members, should not be restricting its members from issuing/acquiring other competing products. The analogy is often made to a supermarket being able to sell all branded products and members should, therefore, be able to issue any other payment card product that they choose to do so.

On the other side of the coin is the interest of MasterCard and the membership as a whole in having the benefit of dedicated members promoting, issuing, acquiring and maximizing the development of the MasterCard brand. It certainly can be said that a member participating in another competing general purpose card program would, at a minimum, divert the attention, if not the support, including investment dollars, of the member from the MasterCard brand. Ultimately, this could also result in a loss of share to MasterCard and damage to our brand. Additionally, from the consumer perspective, the member offering, for example, American Express cards to the same consumer to whom it has issued a MasterCard Card, may create confusion in the consumer's mind and diminish the value of the MasterCard product and the cardholder's loyalty to it. Furthermore, any comparative advertising conducted by American Express would further confuse the consumer as to the respective attributes of the two products issued by the same member.

Finally, any analysis of the impact on the brand of a decision to allow members to participate in other competing programs must take into consideration the reaction of the members, particularly in areas where (i) dual issuance is the norm (ii) VISA has a rule precluding VISA member participation in competitive general purpose card programs and (iii) VISA continues to hold the line on its current rule. Therefore, management is surveying other key members not represented on any MasterCard board for their input, particularly from the perspective of their respective regions, which results will be shared with the Board at the meeting. A copy of this agenda item will also be provided to each regional board for its input.

Options to be Considered

Before addressing the options, the first question for the Board is whether the Board should consider adoption of a worldwide rule or policy or should the Board empower each regional board to decide whether or not to implement a rule or policy based upon the regional board's view of what would be best for MasterCard in its region. By the time of the Board meeting, we will be prepared to discuss the various regional boards' positions on this issue. In advance of this input, it is management's position, at this time and as reflected in the proposed resolutions below, that the regional boards should each be empowered to make that decision for their regions.

As for the options themselves, MasterCard has three, namely, (i) do nothing, (ii) announce a rule or policy that MasterCard will allow members to do so on certain terms and conditions or (iii) announce that MasterCard members may not participate in any competing general purpose card programs. Management does not recommend that we do nothing. Of the remaining two options, management strongly prefers implementation of a policy not allowing participation by members desiring to remain members where this can be done legally.

With respect to the option of allowing members to participate in competing general purpose card programs, management strongly believes that any such regional decision should impose some conditions if this approach were to be adopted. For example, a regional board might require that:

1. such a member advise MasterCard in advance that it intends to participate in such a program;
2. such competitive program must be available to all MasterCard members choosing to participate in such a program on substantially equal terms, so that some of our members are not disadvantaged;
3. such member conduct the competitive program, at a minimum, separate and apart from its MasterCard program and that the same individuals not work on both programs;
4. such member not conduct any advertising denigrating the MasterCard brand;
5. such member commit to a certain level of spending with respect to the MasterCard brand and commit to achieving specified gross dollar volumes on MasterCard-branded cards; and/or
6. higher or additional assessments, or some other type of fee, be payable by such members to build a promotion development fund for the MasterCard brand.

These conditions would apply to the member or any company affiliated with the member as part of a holding company structure.

With regard to the option to preclude participation, there are several questions as to how to implement such an approach, including, without limitation, what to do with existing arrangements of members in competing general purpose card programs. Furthermore, a decision to implement such a policy or rule should probably address the possibility of allowing any affected member to have the opportunity over some extended period to sell its MasterCard portfolio.

Implementation of Any Proposed Action

Irrespective of the Board's decision, there are additional considerations when implementing this decision.

An initial question is whether MasterCard should adopt a rule or a policy. The advantage of a policy is that it may allow MasterCard some flexibility in a particular circumstance if it believes it may be appropriate to allow some latitude to a member, whereas a rule may require a more precise definition of the restrictions and the remedy. A related question is whether such a policy should cover all competitive general purpose card programs as opposed to the present American Express proposal to our members. The advantage of a policy limited to the American Express proposal is that it continues the long-standing MasterCard approach that the Board should treat competitive issues on a case-by-case basis, taking into account the facts and circumstances, and the impact, on the MasterCard brand at a given point in time. The American Express program also appears not to be available on equal terms to all members, thereby discriminating against many of our members and, therefore, there is a further likelihood of successful defense to any challenge.

Where a competition regulator in a country or region has taken a position that a policy precluding participation in competing programs is illegal, were it decided to adopt a global policy or rule, such a policy or rule would not be immediately implemented in such a region or country. In the European Union, for example, a question has been raised whether such a policy would be legal. The preliminary announcements by the head of the Competition Bureau indicate his view that it would not be appropriate to do so. There has also been a report that the U.S. Justice Department may be initiating a review of this issue in reaction to recent events. In these and other situations, we would meet with the appropriate regulatory body to explain our position regarding the competitive benefits of implementation of the policy/rule.

There is one final point which the Board should consider in its deliberations. Despite the fact that MasterCard will only take action which it believes to be legal, we must be aware that any action taken by the Board or any regional board to not allow, or seriously limit, members' participation in competitive general purpose card programs is likely to be challenged, either in court or before government regulators, or both. A decision to proceed should represent a commitment to vigorously defend any such initiative by a competitor.

RECOMMENDATION

As indicated above, each regional management will provide a copy of this agenda item for evaluation by their respective regional boards, all but one of which will be meeting immediately prior to the Board meeting. They will be asked to recommend to the Board whether (i) they believe there should be one global rule or policy adopted by the Board or (ii) each regional board should have the right to decide how to proceed in its region.

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The regional boards will also be asked to adopt, subject to Board empowerment, the policy or rule, if any, the regional board will implement if the Board decides to authorize it to make the decision as to its region.

In advance of the meeting and dependent upon the regional boards' recommendations, MasterCard management recommends that the Board adopt the following policy resolutions.

RESOLUTIONS OF THE BOARD OF DIRECTORS

RESOLVED, that, the Board believes, as a matter of policy, it is in the best interest of the MasterCard brand that MasterCard members should be dedicated to the promotion and support of the brand and, therefore, allowing members to also participate as issuers and/or acquirers in a competing general purpose card program would not be appropriate. A "competing general purpose card program" is a credit or T&E card program with a mark that is a multi-region acceptance mark and the cards of which are accepted by merchants in at least two regions of the world (i.e., MasterCard regions) and which merchants are not affiliates of the card issuer;

RESOLVED FURTHER, that, the foregoing notwithstanding, each MasterCard regional board be, and hereby is, authorized to take whatever action, if any, it deems appropriate with respect to members participating in competing general purpose card programs in its region; and

RESOLVED FURTHER, that, the Board recommends that any region choosing to allow MasterCard members in its region to participate in competing general purpose card programs should incorporate the terms and conditions referred to above, in addition to any other term or condition it deems appropriate, as a prerequisite to the authorization of such activities.

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